Shyer v Shyer
2019 NY Slip Op 32138(U)
July 18, 2019
Supreme Court, New York County
Docket Number: 651109/2018
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

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CATHERINE SHYER, as preliminary executrix of the estate of ROBERT SHYER,

Plaintiff and Counterclaim Defendant,

- v -

CHRISTOPHER SHYER, JAMES SHYER, and ZYLOWARE CORPORATION,

Defendants and Counterclaim Plaintiffs,

and

ZYLOWARE CORPORATION,

Third Party Plaintiff,

- v -

CATHERINE SHYER, individually,

Third Party Defendant.

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INDEX NO. 651109/2018

MOTION DATE 01/02/2019

MOTION SEQ. NO. 006

DECISION AND ORDER

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 166, 167, 168, 169, 170, 171, 174, 175
were read on this motion to DISMISS THIRD-PARTY CLAIMS.

This motion relates to the Third Party Complaint brought by Zyloware Corporation ("Zyloware") alleging that Catherine Shyer, in her individual capacity, (i) tortiously interfered with a contract between Zyloware and the estate she was administering as preliminary executrix, and (ii) defrauded Zyloware by concealing certain information from the company in the course of applying for long-term disability benefits on behalf of her now-deceased husband.

Ms. Shyer moves to dismiss these third-party claims under CPLR 3211(a)(7) for failure to state a cause of action. For the reasons set forth below, that motion is granted.

Factual Background

Zyloware is "the oldest family-owned and operated optical frame supplier in the United States." (Third Party Complaint ("TPC") ¶23) (NYSCEF Dkt. No. 135). The company was founded by Joseph Shyer. (*Id.* ¶1). For several decades, it was run by Joseph's sons, Robert Shyer and Henry Shyer. (*Id.* ¶23). Eventually, Robert and Henry's sons—Christopher Shyer and James Shyer, respectively—joined Zyloware and assumed significant leadership responsibilities within the company. (*Id.* ¶¶ 1, 36-40).

In March 2010, Robert, Henry, Chris and James entered into a Shareholders Agreement (NYSCEF Dkt. No. 154) and a Master Executive Employment Agreement (the "Employment Agreement") (NYSCEF Dkt. No. 155) (collectively, the "Succession Agreements") to formalize the succession of leadership in Zyloware.

The Shareholders Agreement

The Shareholders Agreement outlined the rights, responsibilities, and ownership interests between and among the four Shyers. Under the Agreement, each of them would hold a 25% stake in the company. (TPC ¶47). Christopher and James were designated co-chief executive officers of Zyloware, while Robert and Henry remained employed as executives and directors. (*Id.*). The Shareholders Agreement also set forth procedures for Zyloware to buy back Robert and Henry's Zyloware shares upon their deaths. (*Id.* ¶56). To that end, Section 6.1 provided:

> In the event that a Signing Shareholder dies prior to the termination of this Agreement, then the Corporation shall purchase from the estate of that

> Deceased Shareholder, and the estate of that Deceased Shareholder shall sell to the Corporation, all of the Shares owned by that Deceased Shareholder at the time of his death at a price equal to the Purchase Price Per Share, determined as provided in Section 6.2 below and on the terms set forth in Section 6.4 below.

(*Id.* ¶57; Shareholders Agreement at 25).

Further, Section 6.6 "establishes a mandatory closing date, tied to the collection of Insurance Proceeds and to the appointment of the preliminary executrix of the Estate." (*Id.* ¶63). On that closing date, Section 6.6 requires that "the preliminary executor, executor or administrator of the Deceased Shareholder shall deliver to the Corporation certificates for all Shares being sold . . . and the Corporation shall deliver to the preliminary executor, executor or administrator of the Deceased Shareholder the required payment . . . ." (Shareholders Agreement at 29).

The Employment Agreement

The Employment Agreement includes two features that are particularly relevant to the dispute here. First, the Agreement provided that Robert (and Henry) "receive[d] substantial annual salaries/benefits for life," but "would lose certain of these benefits if no longer employed." (TPC ¶¶53, 55). These benefits included Zyloware's group health insurance coverage, and perks such as use of a corporate credit card and vehicle. (*Id.* ¶55). Second, the Employment Agreement allowed Zyloware to terminate Robert's employment if he suffered a "disability" within the meaning of the Agreement. (*See* Employment Agreement at 30 ("[T]he Board shall have the right to terminate an Executive's employment upon thirty (30) days' prior written notice in the event of such Executive's Disability")). "Disability," in turn, was defined as follows:

> [T]he inability of an Executive to perform his functions as a shareholder, officer and/or director of the Corporation as provided herein, or the duties

> that he is required to perform . . . because of a physical, mental or emotional condition which persists for an aggregate of 120 days (which need not be consecutive) during any period of 360 consecutive days, as determined by a medical doctor selected by the Board, to whom each Executive hereby consents to present himself promptly for examination upon the Board's request.

(Employment Agreement at 5-6).

Catherine and Robert Shyer

Robert Shyer passed away on December 19, 2017. (TPC ¶23).

Ms. Shyer ("Catherine"), Robert's second wife, is the preliminary executrix of his estate (the "Estate"). (*Id.* ¶24). As relevant here, Zyloware's allegations against Catherine focus on her alleged interference with the Succession Agreements and her handling of Robert's long-term disability benefits.

On July 9, 2014, "Catherine obtained a New York Short Form Power-of-Attorney signed by [Robert]," which "stated that it would become effective upon written acceptance by Catherine." (*Id.* ¶¶105, 107). That same day, Robert executed a Last Will and Testament (the "Will") which, among other things, named Catherine as sole executor of Robert's estate. (*Id.* ¶104). Catherine accepted the power-of-attorney several months later, on November 6, 2014. (*Id.* ¶110). And on that day, Robert modified the Will to correct a mistake in the July 2014 version. (*Id.* ¶109).[1]

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[1] The Will is currently the subject of a Surrogate's Court case, captioned *Probate Proceeding, Will of Robert M. Shyer*, File No. 2018-847 (the "Probate Proceeding"), which includes allegations that "Catherine exercised undue influence over [Robert] in connection with his execution of the November 2014 Will and the July 2014 Will." (*Id.* ¶¶7, 109). Zyloware repeats those allegations in the TPC and also claims, "[u]pon information and belief," that "there is a question as to whether [Robert] had lost the requisite mental capacity before he executed the Will, and Catherine accepted the power of attorney, in November 2014." (*Id.* ¶113). As a result, Zyloware alleges that "Catherine lacks the authority to act as the executrix of the Estate." (*Id.* ¶116). Those

In 2015, Zyloware says, Catherine "persuaded Zyloware to continue employing [Robert] despite his declining health at a time when she had applied for a year's worth of long-term disability ('LTD')." (*Id.* ¶19). While Robert was assured a certain level of salary and benefits for life regardless of his employment status, his beneficiaries were not. If Robert were terminated under the "disability" provision of the Employment Agreement, Catherine and other beneficiaries "would have been relegated to less robust health coverage and would have lost other benefits, worth about $150,000 annually, including the lease and insurance payments for a second family car, a computer, cell phone, and travel expenses." (*Id.*). Therefore, Zyloware alleges, "[t]o avoid losing her benefits, Catherine concealed from [Robert's] own son and other Zyloware shareholders the fact that Robert, who was in obvious physical decline, had been diagnosed with dementia or symptoms consistent with dementia." (*Id.* ¶20).

Zyloware eventually retired Robert on November 30, 2017, about three weeks before he died. (*Id.* ¶23).

The Estate and the Closing

Catherine was appointed preliminary executrix of the Estate by the New York County Surrogate's Court on March 6, 2018. (*Id.* ¶¶6, 24).

The parties then scheduled the closing date for transactions under the Shareholders Agreement—*i.e.*, the date on which certain share buyback provisions

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issues are distinct from the claims asserted in Zyloware's Third Party Complaint and therefore are not before the Court on the instant motion. If Catherine's status as preliminary executrix changes—for example, if her appointment is found by the Surrogate to have been void *ab initio*—that may also change the viability of claims that may be asserted against her, though the Court expresses no opinion on that subject at this point.

would kick in—for March 16, 2018. (*Id.* ¶158). On February 13, Zyloware's counsel had informed the Estate (through the Estate's counsel) that Zyloware intended to purchase Robert's remaining shares. Along with that notice, Zyloware's counsel provided the Estate's counsel with a copy of an accountant's calculation of the price Zyloware was willing to pay for those shares. (*Id.* ¶159).[2] Catherine, on behalf of the Estate, objected to the terms that Zyloware outlined, and Zyloware objected to those objections. Zyloware alleges that the Estate's actions ran "contrary to the Shareholders Agreement," (*id.* ¶165), while the Estate maintains that it was Zyloware's offer which breached the Agreement.

On the closing date, the Estate's counsel rejected Zyloware's "tender of a price and note that violate[d] the Shareholders Agreement and d[id] not protect the Estate's legitimate concerns and rights." (*Id.* ¶167). Zyloware alleges that, "[a]t Catherine's direction, the Estate has not delivered any of the Option or Remaining Shares to Zyloware, in material breach of the Shareholders Agreement." (*Id.* ¶66).

Procedural History

Catherine, in her capacity as preliminary executrix of the Estate, sued Zyloware and individual defendants Christopher, James, and Henry Shyer in March 2018. (Amended Complaint ("Am. Compl.") ¶¶7-9, 11-28) (NYSCEF Dkt. No. 29). In that action, Catherine alleged four causes of action—declaratory judgment, breach of

[2] The accountant, Stephen Wagner, is described in the TPC as "a certified public accountant and a trusted advisor to [Robert], Henry, and Zyloware for many years." (TPC ¶10). Wagner allegedly employed "a contractual methodology" for valuing the shares. (*Id.*). That methodology plays a key role in the Estate's allegations against Zyloware and the individual defendants, but the Court need not delve into the minutiae of the pricing dispute on this motion.

contract, breach of fiduciary duty, and injunctive relief—stemming, in part, from the defendants' purported violation of the Shareholders Agreement. (*Id.* ¶1). The defendants moved to dismiss. In a Decision and Order dated July 19, 2018, this Court (Bransten, J.) dismissed the breach of contract claim against the individual defendants, dismissed the injunctive relief claim against all defendants, and otherwise denied defendants' motion. (NYSCEF Dkt. No. 64).

On November 14, 2018, Zyloware filed a Third Party Complaint alleging two causes of action against Catherine individually (rather than in her capacity as preliminary executrix of the Estate): (1) wrongful interference with contract, on the basis that Catherine induced the Estate to breach the Shareholders Agreement, and (2) fraud, based on Catherine's alleged failure to disclose to Zyloware the depth of Robert's illness.

Legal Analysis

In assessing a motion to dismiss, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). "This presumption of truth is not, however, accorded to a legal conclusion that is merely couched as a factual allegation in the complaint." *Ace Arts, LLC v. Sony/ATV Music Pub., LLC*, 56 F. Supp. 3d 436, 441 (S.D.N.Y. 2014) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Similarly, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by

documentary evidence, are not entitled to such consideration." *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996).

A. Tortious Interference with Contract

Zyloware alleges that Catherine, in her individual capacity, improperly interfered with the Shareholders Agreement by inducing the Estate to "materially breach the Shareholders Agreement by, among other things, (a) failing and refusing to deliver the Shares to Zyloware, no later than the Closing, and (b) filing a suit founded on false allegations." (TPC ¶178).[3]

Zyloware's tortious interference claim is peculiar in that it alleges, essentially, that Catherine tortiously caused *herself* (as preliminary executrix) to cause the Estate to breach the agreements. Neither Zyloware nor Catherine have cited case law squarely addressing whether an executor may be held personally liable for tortiously interfering with the estate's contracts when the interference and the breach allegedly were caused by the same individual, albeit in different legal capacities.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract,

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[3] The Court focuses here on Catherine's alleged failure to deliver certain Shares to Zyloware, not on "filing a suit founded on false allegations," as have the parties in their briefs. The latter claim is, in any event, without merit. "Where the interfering conduct is a civil suit, it must be shown that the suit was frivolous." *Arnon Ltd v. Beierwaltes*, 125 A.D.3d 453, 453–54 (1st Dep't 2015). While Zyloware alludes to an insidious intent behind Catherine's lawsuit, *see* TPC ¶12 ("It is no coincidence that Catherine . . . only filed suit after [Robert] had died."), and calls her lawsuit meritless, *id.* ¶178 ("founded on false allegations"), on its face the lawsuit is not frivolous. While perhaps not dispositive of the point on its own, the conclusion is bolstered by the fact that this Court (Bransten, J.) has previously assessed the merits of the complained-of suit and declined to dismiss it in its entirety. (*See* July 19, 2018 Decision and Order granting in part and denying in part defendants' motion to dismiss) (NYSCEF Dkt. No. 64).

defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996); *see White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426-27 (2007) (describing requirements as "the existence of [plaintiff's] valid contract with a third party, defendant's knowledge of that contract, defendant's intentional *and improper* procuring of a breach, and damages") (emphasis added); *see also Cerveceria Modelo, S.A. De C.V. v. USPA Accessories LLC*, No. 07 CIV. 7998 (HB), 2008 WL 1710910, at *3 (S.D.N.Y. Apr. 10, 2008) (noting "[t]he 'improperly' and 'without justification' elements of tortious interference with contract are indistinguishable in the case law").

As alleged in the TPC, the claim that Catherine interfered with the Shareholders Agreement is tantamount to a claim that Catherine should be held personally liable for the Estate breaching the Shareholders Agreement. According to Zyloware, Catherine procured the Estate's breach by "forc[ing]" and "direct[ing]" the Estate to act contrary to its contractual obligations. (*See* TPC ¶16 ("Catherine intentionally and maliciously forced the Estate to reject Zyloware's tender of the Insurance Proceeds and Note . . . ."); *id.* ¶66 ("At Catherine's direction, the Estate has not delivered any of the Option or Remaining Shares to Zyloware, in material breach of the Shareholders Agreement.")). But these actions do not describe the procurement of a breach; they describe, with different words, the breach itself. Revealingly, Zyloware's TPC includes a counterclaim for breach of contract against the Estate, and in that claim Catherine is implicated "in her role as preliminary executrix of the Estate." (*Id.* ¶199). Since the Estate could act only at Catherine's behest—she was, as Zyloware alleges, the "sole executor" of the

Estate (*id.* ¶104)—the Estate's actions in allegedly breaching the Shareholders Agreement cannot be decoupled from Catherine's ordering the Estate to do so.

To hold otherwise would unjustifiably enlarge the scope of personal liability against executors, who could in all or most contract cases be alleged to have "caused" the estate to breach a contract. Under New York estate law, "[a] personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if [s]he failed to exercise reasonable care, diligence and prudence." N.Y. Est. Powers & Trusts Law ("EPTL") § 11-4.7(b); *Collins v. HSBC Bank USA*, 305 A.D.2d 361, 362 (2d Dep't 2003). In *Collins*, a bank brought a third-party action against the appellants, "individually and as administrators of the estate of [the decedent]," to recover money that the bank had mistakenly paid out to them. 305 A.D.2d at 362. The trial court granted summary judgment to the bank, and the issue on appeal was "whether [the bank] is entitled to summary judgment against the appellants *individually* for the payment mistakenly made." *Id.* (emphasis added). The Appellate Division, Second Department, reversed the lower court's ruling as to the executors' individual liability:

> Pursuant to EPTL 11-4.7 (b), the appellants would be individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if they "failed to exercise reasonable care, diligence and prudence." HSBC failed to establish as a matter of law that the appellants failed to exercise reasonable care, diligence, and prudence.

Id. (internal citations omitted).

Although this case stands on a different procedural footing than *Collins*, Zyloware's claim is foreclosed for similar reasons. At bottom, Zyloware's allegations against Catherine stem from her "control of the estate or for torts committed in the

course of administration of the estate." Zyloware does not allege that Catherine "failed to exercise reasonable care, diligence, [or] prudence." By reframing the Estate's breach of contract as Catherine's tortious interference with that contract, Zyloware's claim threatens to circumvent the statutory standard for imposing personal liability on estate administrators.[4]

Zyloware contends that an estate, like a corporation, constitutes a legal entity that stands apart from the individuals tasked with administering it. Under that theory, Catherine would be akin to a corporate officer who may, under some circumstances, be held liable for tortiously interfering with her corporation's contracts. Zyloware therefore cites to several cases involving tortious interference claims in the corporate context. As a general matter," a corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer." *Buckley v. 112 Central Park South*, 285 A.D. 331, 334 (1st Dep't 1954). However, "[i]t is equally clear that when the corporate officer commits independent torts or predatory acts directed at another, he may not seek refuge behind the mantle of immunity." *Id.*; *see also Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 228 (1st Dep't 1998) ("To establish a corporate officer's liability for inducing a breach of a contract between the corporation and a third party, the complaint must allege that the officers' . . . acts were taken outside the scope of their employment or that they personally profited from their acts.") (internal quotation marks omitted).

[4] In view of the Court's dismissal of this claim, it need not address separately Zyloware's claim for punitive damages

Zyloware's claim against Catherine is not analogous to a claim against a rogue corporate officer. As a threshold matter, "[e]states differ from corporations in that they are not recognized as separate legal entities." *In re Estate of Walsh*, 17 Misc. 3d 407, 410 (Sur Ct. Bronx Cty. 2007). Because "[a]n estate is not a legal entity . . . any action for or against the estate must be by or against the executor or administrator in his or her representative capacity." *Grosso v. Estate of Gershenson*, 33 A.D.3d 587 (2d Dep't 2006); *Ralusa, Inc. v 1101 43rd Ave. Realty LLC*, No. 156944/14, 2015 WL 7348963, at *7 (Sup. Ct. N.Y. Cty. Nov. 20, 2015) (same); *Architectural Body Research Found. v. Reversible Destiny Found.*, 335 F. Supp. 3d 621, 634 (S.D.N.Y. 2018) (same); *Castellotti v. Estate of Castellotti*, No. 17CIV1512NGPK, 2019 WL 1778148, at *3 (E.D.N.Y. Apr. 22, 2019) (same); *see also Skolnick v. Goldberg*, 297 A.D.2d 18, 21 (1st Dep't 2002) ("The action was commenced against the wrong party; that is, it was directed at the executrix, individually, rather than in her representative capacity and instead of being asserted against the estate.") (citing N.Y. EPTL § 11-3.1).

But even if the corporate cases did apply to the situation here, Zyloware's claim would still fail. The TPC does not state facts sufficient to show that Catherine acted beyond the scope of her executory authority in directing the Estate to refuse Zyloware's buyback offer. This question—whether Catherine acted within her authority as an executrix in determining that it was appropriate for the Estate to refuse Zyloware's buyback offer—must be separated from the question of whether that refusal constituted a breach of the Shareholders Agreement. Otherwise, if the breach alone manifested a lack of authority, an executrix (like a corporate officer) would face the prospect of personal liability whenever she or he "causes" the estate (or corporation) to allegedly

breach its contractual obligations. While Zyloware contends that Catherine's actions were without justification, the TPC does not adequately allege that her actions were outside the broad scope of her authority as an executrix.

Second, to the extent relevant, the TPC does not adequately allege that Catherine acted against the Estate's interests. To be sure, Zyloware repeatedly alleges that Catherine's actions are harming *Zyloware*. (*See, e.g.*, TPC ¶4 ("Catherine . . . wants to obliterate the succession plan that [Robert] devised and threaten the ongoing success of her husband's family business.")). But in refusing to deliver Robert's shares back to Zyloware, the Estate (via Catherine) is ostensibly seeking to benefit itself and its beneficiaries. Catherine, then, "is not personally liable to one who has contracted with the [Estate] on the theory of inducing a breach of contract, merely due to the fact that, while acting for the [Estate], [s]he has made decisions and taken steps that resulted in the [Estate's] promise being broken." *Courageous Syndicate, Inc. v. People-to-People Sports Comm., Inc.*, 141 A.D.2d 599, 600 (1st Dep't 1988). Absent specific allegations that Catherine acted to enrich herself at the expense of the Estate, Zyloware "merely states a breach of contract claim." *Id.* at 600-601.

The Court does not find, as Zyloware cautions against, "that [Catherine] is insulated from liability by reason of the fact that she has the cover of agency of executrix." (May 9, 2019 Oral Arg. Tr. at 6:11-13) (NYSCEF Dkt. No. 193). As noted above, a claim against Catherine in her individual capacity may be viable if it can be shown that she acted outside the scope of her executorship or if, under N.Y. EPTL § 11-4.7(b) "[s]he failed to exercise reasonable care, diligence and prudence" in her stewardship of the Estate's property. Cases invoking this statutory provision include

actions brought not only by estate beneficiaries against estate administrators, *see In re Lanza*, 19 A.D.3d 494, 495 (2d Dep't 2005) (holding that former executor's "fail[ure] to monitor the [estate's] escrow account, allowing the funds to be depleted," made him "personally responsible for the loss") (citing N.Y. EPTL § 11-4.7(b)), but also by third-party plaintiffs that were not beneficiaries of the estate, *see Collins*, 305 A.D.2d at 362.

Moreover, Zyloware may (as it has) still sue the Estate—*i.e.*, Catherine in her representative capacity as preliminary executrix of the Estate—for breach of contract. *See* N.Y. EPTL § 11-4.7(c) ("Claims based on . . . obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted *against the estate* by proceeding against the personal representative in [her] fiduciary capacity, whether or not the personal representative is individually liable therefor.") (emphasis added); *Knobel v. Shaw*, 90 A.D.3d 493, 494 (1st Dep't 2011) (denying motion to dismiss because "[p]laintiff ha[d] stated a cause of action for breach of contract against . . . executrix of Mr. Shaw's estate"); *Castellotti*, No. 17CIV1512NGPK, 2019 WL 1778148, at *3 (holding that "[t]he breach of contract claim against Ms. Free in her representative capacity [as executrix of estate] survive[d]" motion for summary judgment).

Zyloware's claim for tortious interference with contract is therefore dismissed.

B. Fraud

Zyloware also alleges that Catherine defrauded it by concealing the truth about Robert's health—that is, by failing to inform Zyloware that Robert had been diagnosed with dementia—in order to preserve Robert's employment status and Catherine's access to certain benefits. (TPC ¶¶18-19, 186-193). This claim fails because, putting

aside conclusory assertions in the TPC, (*id.* ¶189), Zyloware does not allege facts establishing that Catherine had or breached a legal duty to disclose her husband's medical information to the company.

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011). But "[a] cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003); *Mobil Oil Corp. v. Joshi*, 202 A.D.2d 318 (1st Dep't 1994) ("[I]n the absence of a confidential or fiduciary relationship between Preferred and Mobil imposing a duty to disclose, Preferred's mere silence, without some act which deceived Mobil, cannot constitute a concealment that is actionable as fraud.").

The closest Zyloware comes to alleging an affirmative misrepresentation is the allegation that, when Catherine learned that Henry had visited Robert in a rehabilitation facility and "observed that [Robert] was in the dementia unit, [she] told Henry that [Robert] had been placed in the wrong unit." (*Id.* ¶152).

That allegation is not sufficient to support a viable fraud claim. Zyloware asserts, "[o]n information and belief," that Catherine's statement was "yet another lie," (*id.*), but provides no further details on the circumstances surrounding the statement. Nor does Zyloware explain how Catherine's alleged misrepresentation fits into its theory of

fraud—in other words, how the statement could have "fraudulently induced Zyloware not to terminate [Robert]'s employment." (*Id.* ¶186). As discussed further below, Zyloware's Board of Directors had the right to order Robert to undergo a medical examination, and to terminate Robert's employment if the examination revealed that Robert was suffering a "disability" within the meaning of the Employment Agreement. "Disability" was not limited to dementia—the term encompassed any "physical, mental or emotional condition which persists for an aggregate of 120 days (which need not be consecutive) during any period of 360 consecutive days." (Employment Agreement at 5-6). By the time Catherine made her alleged misstatement, Zyloware had already "sought to arrange for [Robert] to be examined by a physician," (TPC ¶151), knew that Robert "had suffered a stroke," (*id.* ¶152), knew that Robert "was admitted to a rehabilitation facility," (*id.*), and knew that Robert had "not reported to the office for about one year," (*id.* ¶150).

The crux of Zyloware's fraud claim hinges on acts of omission, rather than affirmative misrepresentations, and thus can survive dismissal only if Zyloware adequately alleges a legal duty running from Catherine to the company that required her to inform the company about the extent of her husband's deteriorating health. *See Elghanian v. Harvey*, 249 A.D.2d 206 (1st Dep't 1998) ("Nor do any of the alleged omissions support plaintiff's claim, inasmuch as there was no fiduciary relationship giving rise to a duty to speak."). While Zyloware suggests three possible sources of that duty, none of them support its claim for fraudulent concealment based on the facts pleaded in the TPC.

First, Zyloware contends that "even if Catherine could have otherwise remained silent about Robert's health, once she sought Zyloware's support for his LTD claim and ongoing employment, she had a duty to speak 'truthfully about material issues.'" (Zyloware Mem. of Law at 19) (citing *Bank of Am., N.A. v. Bear Stearns Asset Mgmt.*, 969 F. Supp.2d 339, 351 (S.D.N.Y. 2013)). The problem with this argument, however, is that "a fiduciary relationship must exist prior to the transaction complained of and not as a result of it." *Balanced Return Fund Ltd. v. Royal Bank of Canada*, 138 A.D.3d 542, 542 (1st Dep't 2016); *Elghanian*, 249 A.D.2d at 206-207 ("[T]he requisite relationship between the parties must have existed prior to the transaction from which the alleged wrong emanated, and not as a result of it.") (affirming dismissal of fraud claim). Zyloware cites no applicable precedent for imposing a legal obligation upon a spouse in Catherine's position—on pain of a claim for fraud—to affirmatively disclose otherwise confidential information about the specific nature of her husband's medical condition, particularly when the employer, as here, is aware that a serious health issue is present and has the contractual right to conduct its own medical examination.[5]

Second, Zyloware claims that the duty to disclose emanated from Catherine's power of attorney over Robert, which purportedly grafted Robert's fiduciary duties to Zyloware onto Catherine. (*See* Zyloware Mem. of Law at 19). "[A] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power *for the*

[5] It is true that "a party may be liable for nondisclosure . . . when it has made a misleading partial disclosure." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 135 (1st Dep't 2014). But Zyloware does not cite any relevant, specific instance of Catherine making a "misleading partial disclosure" about her husband's health. Nor does Zyloware assert any case law imposing an affirmative legal duty upon a spouse in Catherine's position to disclose such information to the spouse's employer.

benefit of the principal." *In re Estate of Ferrara*, 7 N.Y.3d 244, 254 (2006) (emphasis added). "[T]he relationship of an attorney-in-fact to his principal is that of agent and principal," such that "the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal." *Id.* Zyloware cites no authority for the proposition that the attorney-in-fact undertakes an independent fiduciary duty to third parties, including her *principal's* principals, exposing herself to individual liability to such parties. Instead, the cited authorities stand only for the unsurprising proposition that Catherine owed Robert, not Zyloware, a fiduciary duty. *See Am. Int'l Grp., Inc. v. Greenberg*, 23 Misc. 3d 278, 287 (Sup. Ct. N.Y. Cty 2008) ("As directors, Greenberg and Smith undoubtedly owed fiduciary duties of care, loyalty and good faith to AIG."); *Lamdin v. Broadway Surface Advert. Corp.*, 272 N.Y. 133, 138 (1936) ("He is prohibited from acting in any manner inconsistent with *his* agency . . . .") (emphasis added).

Third, and finally, Zyloware asserts that "Catherine's duty to disclose also arose from her unique and special knowledge of [Robert]'s diagnosed medical condition." (Zyloware Mem. of Law at 19). This argument raises the so-called "special facts" doctrine, which holds that "absent a fiduciary relationship between parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *Pramer S.C.A. v. Abaplus Int'l Corp.*, 76 A.D.3d 89, 99 (1st Dep't 2010). The doctrine does not apply, however, if the information could have been discovered through due diligence—what courts term the "exercise of ordinary intelligence." *Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 278 (1st Dep't 2005) (quoting *Schumaker v Mather*, 133 N.Y. 590, 596 (1892) ("[If] the other party has the means available to him of knowing . . . he must make use of

those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations."). And "[i]f nothing else, the 'exercise of ordinary intelligence'" imposes, "at the very least, a duty to inquire." *Jana L.*, 22 A.D.3d at 278.

Based on the facts alleged in the TPC, Zyloware had both the means and the opportunity to discover the nature of Robert's obvious health problems notwithstanding Catherine's alleged silence on the matter. As noted above, the Employment Agreement empowered Zyloware's Board of Directors (which included Robert's son and nephew), at any time, to request that Robert "present himself promptly for examination." (Employment Agreement at 6). And at that examination, a doctor selected by Zyloware could determine whether Robert suffered a "disability" within the meaning of the Employment Agreement. (*Id.* at 5-6). But Zyloware did not exercise this contractual right to inquire until June 2017. (TPC ¶150). By that point, Robert "had not reported to the office for about one year," (*id.*), was experiencing an "obvious physical decline," (*id.* ¶20), and "Zyloware had become concerned that . . . it should retire him as an employee." (*Id.* ¶132; *see also id.* ¶147 ("Physically he was weak and lacked full control over his body. His memory was faulty, and he had a limited ability to speak.")). Given that the allegedly fraudulent scheme here concerned Robert's disability benefits, the broad "disability" provision—which did not require a showing of dementia—was particularly salient. Because Zyloware "could have, but chose not to, inquire about" Robert's health, "[t]he special facts doctrine is not applicable." *Johnson v. Levin*, 165 A.D.3d 497 (1st Dep't 2018).

Zyloware protests that it "was in the optical eyewear frame business, not in the business of making neurological medical diagnoses." (Zyloware Mem. of Law at 20).

That is true, and presumably that is why Zyloware contracted for the right to order a medical examination. The company did not need to "mak[e] neurological medical diagnoses," or any kind of diagnoses. Rather, Zyloware could have ordered Robert to undergo a medical examination *at any time*, and certainly once it suspected that he suffered a "physical, mental or emotional condition" that would interfere with his enumerated duties.[6] For the same reason, Zyloware's argument that "discerning a condition such as dementia surely involves more than the exercise of 'ordinary intelligence'" also misses the mark. (*Id.*). The question here is not whether "ordinary intelligence" required Zyloware to discover the condition, but whether "ordinary intelligence" required Zyloware to at least *inquire* about it. *See Jana L.*, 22 A.D.3d at 278 ("If nothing else, the 'exercise of ordinary intelligence' suggests a simple inquiry . . . ."). Under the circumstances, Zyloware did have a duty to inquire. In those circumstances, Catherine had no duty to volunteer the truth about Robert's health.

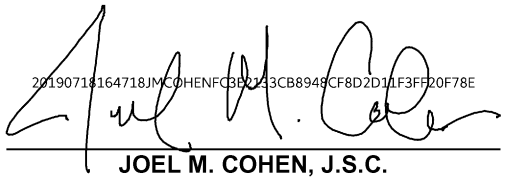
Therefore, Zyloware's fraud claim is dismissed.

As such, it is:

ORDERED that Third Party Defendant's motion to dismiss is GRANTED.

[6] Whether Robert's apparent symptoms were consistent with dementia (as opposed to some other ailment) is immaterial because Zyloware's termination rights did not depend on Robert suffering from dementia. Instead, a disability includes any "physical, mental or emotional condition which persists for an aggregate of 120 days (which need not be consecutive) during any period of 360 consecutive days." (Employment Agreement at 5-6).

This constitutes the Decision and Order of the Court.



7/18/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE